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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 188

THE UNITED STATES, *Petitioner,*

v.

COWDEN MANUFACTURING COMPANY

On Petition for a Writ of Certiorari to the Court of Claims of the United States.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

PHIL D. MORELOCK,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Opinion Below.

The opinion of the Court of Claims (R. 12) is reported in 33 F. Supp. 141.

Jurisdiction.

The judgment of the Court of Claims was entered April 1, 1940 (R. 17). The petition for writ of certiorari was filed June 27, 1940. Service was had and acknowledged by

the respondent on July 17, 1940. The jurisdiction of this court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Question Presented.

Where respondent contracted to sell to the United States mechanics suits at a certain price and the contract provided for reimbursement to respondent for any processing taxes imposed upon the materials or supplies used by the respondent in fulfilling its contract, and,

Where processing taxes were imposed on the materials subsequent to the date of the contract, billed to and paid by the respondent to the manufacturer as a separate item,

Is the respondent entitled to recover under the terms of the contract from the United States the amount of the processing taxes paid to the manufacturer of the materials upon which the taxes were imposed?

Statement.

Respondent is a Missouri corporation with officers at 412 West 8th Street, Kansas City, Missouri (R. 9).

On June 24, 1933, pursuant to a bid submitted on June 6, 1933, it entered into a contract, No. W-699-qm-4800 (O. I. 2538), with the United States through the proper purchasing officers of the Quartermaster Corps at Philadelphia, Pennsylvania, in which respondent agreed to sell to the United States and deliver at the Quartermaster Depot at Philadelphia, Pennsylvania, 23,496 suits, mechanics type B-1 at $1.90 for which the United States agreed to pay $44,642.40. In accordance with a change order dated July 5, 1933, under article 7 of the contract, the total was increased upon written order from the proper contracting officer of the War Department and respondent was required to and did furnish 11,724 additional suits, mechanics type B-1 at $1.90 for which the United States agreed to pay $22,275.60. All suits, totalling 35,220, were delivered by

the respondent, accepted and approved by the United States, and $66,918.00 paid by the United States to the respondent as provided by the contract. (R. 9-10)

Both the bid made June 6, 1933, and the contract of June 24, 1933, contained the following provision:

> "Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under the contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change, will be charged to the Government and entered on vouchers (or invoices) as separate items." (R. 10)

Respondent, in the manufacture of the suits, used 213,127¾ yards of cotton cloth purchased from McCampbell and Company, 320 Broadway, New York, selling agents for the Graniteville Manufacturing Company of South Carolina, a first domestic processor. Also respondent used 885-2/5 units of cotton thread purchased from the American Thread Company. The confirmation of respondent's orders for these materials by McCampbell and Company under date of June 23, 1933, and the American Thread Company, dated June 24, 1933, contained clauses to the effect that any Federal Taxes imposed after the confirmation upon the materials would be in addition to the prices quoted. (R. 10-11)

Pursuant to the provisions in the confirmations, McCampbell and Company billed the respondent as a separate item for processing tax in the amount of $4,425.54 and the American Thread Company billed the respondent as a separate item for processing taxes in the amount of $44.44. These

taxes were paid by the respondent to the processors and in turn by them paid to the Collector of Internal Revenue. (R. 11)

Respondent duly made claim and demand against the United States with the War Department for an increase in its contract price of $4,469.98 which was the processing tax imposed upon the processing of the cotton used in the manufacture of the cloth purchased and used by the respondent in the manufacture of the mechanics suits furnished by the respondent to the United States. (R. 11-12)

Thereafter, the claim was referred to the Comptroller General of the United States and was denied and rejected by the Comptroller General in his decision dated August 11, 1936, A-68085. (R. 12)

The Secretary of Agriculture, pursuant to authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31) as amended, prescribed that the first marketing year for cotton began August 1, 1933. The tax was fixed at 4.2 cents per pound beginning August 1, 1933. The processing taxes of $4,469.98 were assessed and paid subsequent to the date of the contracts entered into between the respondent and the War Department and subsequent to the agreements between the respondent and the processors. (R. 12)

This suit was filed December 1, 1938, in the Court of Claims of the United States, which rendered an opinion in favor of and entered judgment for the respondent in the amount of $4,469.98 on April 1, 1940. (R. 1, 9, 17)

Argument.

This was not a suit for the recovery of a tax but an action based upon the provisions of a contract. The respondent entered into the contract with the United States in good faith. The prices contracted for did not include any processing taxes. It was understood by the respondent and was the express provision of the contract that should any processing tax be imposed upon the supplies necessary to use in

the manufacture of the suits which had to be paid by the respondent, then the respondent would accordingly be reimbursed. It was not the intention of the respondent to make any profit with respect to such a tax but merely to be made whole as, if and when such tax was paid, which was provided by the contract. The respondent had every right to expect that it would be reimbursed for the tax which it was forced to pay. *Batavia Mills, Inc.* v. *United States,* 85 Ct. Cls. 447; *Righter* v. *United States,* 85 Ct. Cls. 699; *Telescope Folding Furniture Company* v. *United States,* 31 F. Supp. 780.

The respondent not only did not include the tax which it paid to the processors in its bid and contract price, but such tax could not have been so included because it was unknown as to whether a tax would be imposed upon cotton or, if imposed, as to the amount or measure of such tax. The tax was levied upon the processing of the cotton and paid by the manufacturer which processed the cloth purchased and used by the respondent in the manufacture of the suits furnished to the United States. The processor in turn passed the tax on to the respondent as a specific item. In harmony with the principles laid down in *Lash's Products Company* v. *United States,* 278 U. S. 175, this serves to identify the item which was not absorbed by the manufacturer but was passed on directly to the respondent and is recoverable under the specific provisions of the contract.

By paying the respondent in accordance with the provisions of the contract, the United States is, in effect, merely returning to the respondent the money which was collected from the respondent through the processor as a processing tax which was later voided when the Agricultural Adjustment Act was declared unconstitutional. *United States* v. *Butler,* 297 U. S. 1. Not only has the United States failed to reimburse the respondent in accordance with the contract for the processing tax paid by it on the materials used in the manufacture of the suits but the United States has been unjustly enriched by the collection from the respondent

through the processor of an unconstitutional tax. However, as heretofore stated, this is not a suit to recover a tax but is based upon the provisions of the contract.

The case of *Oswald Jaeger Baking Co.* v. *Commissioner*, 108 F. (2d) 375 (C. C. A. 7th) certiorari denied, April 1, 1940, No. 771, 1939 Term, cited by the petitioner in its brief is not in point. This case involved an appeal from the United States Processing Tax Board of Review, before which, as provided by Title VII of the Revenue Act of 1936 (7 U. S. C. Para. 648), the petitioner had prosecuted a claim for refund for processing taxes after the said claim had been rejected by the Commissioner of Internal Revenue. No contract was involved as in the case at bar.

In support of its petition for a writ of certiorari, the petitioner urges that the decision of the Court of Claims is in conflict with the decision of this Court in *United States* v. *Glenn L. Martin Company*, 308 U. S. 62, hereinafter referred to as the Martin Company. It is respectfully submitted that the position of the respondent is supported by the decision of this Court in the *Martin Company* case in that the respondent's contract with the United States specifically provides for reimbursement to the respondent by the United States of "processing taxes" levied upon the materials used by the respondent in the manufacture of the suits.

The Martin Company contracted with the War Department to furnish aircraft and aircraft materials. The provisions of the contract were substantially identical with the provisions of the contract here under consideration. Subsequent to the date of the contract, the Social Security Act became effective and the State of Maryland enacted an Unemployment Compensation law. The Martin Company paid the United States $794.03 Federal Social Security Taxes and to the State of Maryland $6,943.29 Unemployment Compensation taxes with respect to *payrolls* of employees who were engaged in work on the contracts in 1936 and 1937. The Martin Company sought to recover from

the United States the Social Security taxes and the Unemployment Compensation taxes paid, alleging that such recovery was proper under the terms of the contract.

In denying the right of the Martin Company to recover under its contract, this Court said,

> "Thus, this contract was concerned with Federal taxes 'on' the goods to be provided under it, whatever the occasion for the taxes. And a tax 'on' the relationship of employer-employee—characterized as a tax on payrolls—is not of the type treated by the contract as a tax 'on' the goods or articles sold.
>
> "The contract refers only to Federal taxes, existing or future on 'material', 'articles' or 'supplies.' And additional compensation is provided to offset only Federal taxes of the type of sales taxes and processing taxes, 'applicable directly upon production, manufacture, or sale' and actually paid on supplies delivered to the Government. Since a tax on payrolls, or on the relationship of employment, is not—but in fact is distinct from—the type of tax 'on' articles represented by sales taxes and processing taxes, respondent is not entitled to the additional compensation which it seeks."

Respondent's contract specifically includes the processing taxes which were paid upon the materials used in the manufacture of the mechanics suits sold to the United States, hence the position of the respondent is supported by the decision of this Court in the Martin Company case.

Conclusion.

The decision of the Court of Claims is correct and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for certiorari be denied.

PHIL D. MORELOCK,
Attorney for Respondent.

August, 1940.